RE RABIAH MOHAMED NASIB; EX P MALAYAN BANKING BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPTCY NOS: D8-29-2618-2007 & D8-29-2619-2007]
20 MAY 2009

BANKRUPTCY: *Bankruptcy notice - Validity - Bankruptcy notice not in accordance with judgment - Whether AO and RO set aside - Bankruptcy Rules 1969, r. 18(1)*

This was an appeal by the judgment debtor against the decision of the senior assistant registrar in dismissing her application to set aside the bankruptcy notice and the creditor's petition issued by the judgment creditor. It was submitted for the judgment debtor that the bankruptcy notice was not in accordance with the terms of the judgment upon which the bankruptcy notice was predicated.

Held (allowing the appeal with costs):

(1) The judgment debtor was in this case applying to set aside the creditor's petition on the ground that the bankruptcy notice was not in accordance and not that the bankruptcy notice exceeded the amount claimed. As such, she was not to be treated as having made an application under s. 3(2) to invalidate the bankruptcy notice by reason that the amount stated exceeded the amount of the judgment order which required her to give the requisite notice under s. 3(2)(ii) of the Bankruptcy Act 1967. She was in fact making an application under r. 18(1) of the Bankruptcy Rules 1969. (paras 5 & 6)

(2) A challenge that a bankruptcy notice was not in accordance with the judgment was a challenge going to jurisdiction and may be applied for even after the presentation of the petition as in the present case. Herein, the bankruptcy notice was not in accordance with the judgment obtained. The AO and RO must be set aside. (para 7)

Case(s) referred to:

Ĵ Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLĴ 104 CA ***(refd)***

Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLĴ 400; [1987] CLĴ (Rep) 172 SC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(2)(ii)
Bankruptcy Rules 1969, r. 18(1)

For the judgment debtor - T Gunaseelan (Abdul Razak Hashim with him); M/s Sri, Ling & Assocs
For the judgment creditor - Siti Fatimah; M/s Majid & Chen

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

[1] This is an appeal by the judgment debtor against the decision of the Senior Assistant Registrar in dismissing her application to set aside the bankruptcy notice and creditor's petition issued by the judgment creditor.

[2] The fact relevant to the issue can be gleaned from the submissions of the counsel for the parties.

[3] Mr T Gunaseelan for the judgment debtor:

1. I am only proceeding on the issue that the bankruptcy notice was not in accordance with the terms of the judgment upon which the bankruptcy notice is predicated. The judgment provides as follows:

Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur
Dalam Wilayah Persekutuan, Malaysia
(Bahagian Dagang)

Guaman No. D4-22-1521-2006

Antara

Malayan Banking Berhad
(Tempatan No. 3813-k) ... Plaintif

Dan

1. Hortique Group Sdn Bhd
(No. Syarikat: 192543-w)

2. Shahrudin bin Mohd Ali
(No. K/P: 410505-10-5249/A3000094)

3. Rabiah binti Mohamed Nasib
(No. K/P: 501208-06-5168/4050462) ... Defendan-Defendan

PENGHAKIMAN

Tiada Kehadiran telah dimasukkan oleh Defendan Pertama, Defendan Kedua dan Defendan Ketiga dalam tindakan ini. Adalah Pada Hari Ini Dihakimkan bahawa Defendan Pertarna, Defendan Kedua dan Defendan Ketiga hendaklah membayar kepada pihak Plaintif wang sejumlah RM200,443.87 setakat 31hb Mei 2006 ke atas Kemudahan Pinjaman Terma serta faedah keatasnya pada kadar 1.75% + Kadar Pinjaman Asas (pada masa tersebut adalah 6.00% setahun) sehingga ketarikh penyelesaian penuh dan faedah penalty 1.0% setahun atas faedah yang kena dibayar (prevailing rate) dan sejumlah RM90,886-61 ke atas Pinjaman Overdraft serta faedah ke atasnya pada kadar 2.0% + Kadar Pinjaman Asas (pada masa tersebut adalah 6.00%) dikira atas kiraan bulanan dari 1hb Jun 2006 sehingga ketarikh penyelesaian penuh dan faedah penalty 1.0% setahun atas faedah yang kena dibayar (prevailing rate) keatas keseluruhan jumlah ansuran tertunggak dan kos guaman atas dasar peguamcara klien serta kos tindakan ini RM255.00.

Bertarikh pada 16 haribulan Januari 2007

t.t.
...
Penolong Kanan Pendaftar
Mahkamah Tinggi
Kuala Lumpur

Submit: The judgment does not provide that interest is to be computed either on daily rest or monthly rest except for the second amount with respect to overdraft where it provides monthly rest of 2.0% + BLR which at that material time was 6%. Now see the particulars in the Bankruptcy Notice where the interest on term loan is computed on monthly rest and the overdraft is computed on daily rest. This is clearly in variance with the judgment because the judgment does not provide for the computation of interest on monthly rest in respect of the term loan and it does not provide for the computation of interest on daily rest in respect of the overdraft. This means that the amount claimed in the Bankruptcy Notice is not in accordance with the judgment. In fact the claim in the Bankruptcy Notice exceeds what is claimed in the judgment.

2. See *J Raju a/l M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 MLJ 177 per Gopal Sri Ram JCA at Held (1):

A The appellant's complaint was not merely that the respondent in its bankruptcy notice mistakenly claimed more than what was actually due. The complaint was that the bankruptcy notice was not in accordance with the judgment. It was a separate and distinct head of challenge under s. 3(1)(i) of the Act. The authority expressly authorized such a challenge. It is a jurisdictional challenge. That is because it is a condition precedent to the exercise of bankruptcy jurisdiction that a bankruptcy notice shall require the debtor to pay the judgment debt in accordance with the terms of the judgment on which it is founded. It follows that the present case was not a case of a mistake at all. It therefore fell well outside the scope of proviso (ii) to s. 3(2) of the Act (see p 189A-C).

[4] Reply By Cik Siti Fatimah For The Judgment Creditor:

1. The judgment in the bankruptcy notice did not state the interest rate on monthly rest for the term loan and in respect of the overdraft, it did not state daily rest. But the loan agreement cum assignment and also letter of guarantee and letter of offer did provide that interest chargeable in respect of term loan is to be 1.75% on monthly rest and for overdraft 2.0% on daily rest.

2. I agree there is a mistake in that the judgment notice did not follow the judgment order in respect of interests allowed on the two types of loan. Whereas the judgment order provides interest of 1.75% + BLR in respect of the term loan and 2.0% + BLR in respect of overdraft but in the bankruptcy notice the claim is in the reverse. There is a mistake on our part.

Decision

[5] The judgment debtor is in this case applying to set aside the creditor's petition on the ground that the bankruptcy notice is not in accordance and not that the bankruptcy notice exceeded the amount claimed. As such she is not to be treated as having made an application under s. 3(2) to invalidate the bankruptcy notice by reason that the amount stated exceeded the amount of the judgment order which requires her to give the requisite notice under s. 3(2)(ii) of the Bankruptcy Act 1967.

[6] She is in fact making an application under r. 18(1) of the Bankruptcy Rules 1969:

18. Applications to be made by summons in chambers.

(1) Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.

[7] A challenge that a bankruptcy notice is not in accordance with the judgment is a challenge going to jurisdiction and may be applied for even after the presentation of the petition as in the present case. The authority for this proposition is to be found in the following passage of the judgment of Gopal Sri Ram JCA in *J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 at 116:

In our judgment, the following propositions may be distilled from a rationalisation of the authorities we have thus far discussed.

1. When determining an issue under the Act, it is incumbent upon the court to accord its provisions a strict construction.

2. The consequence of such an approach to construction is that a bankruptcy notice that requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment founded is null and *void ab initio*. Hence, a debtor does not commit an act of bankruptcy if he makes default upon such a notice.

3. A challenge on the ground that a bankruptcy notice requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment may be taken at any time after service of the notice.

4. A debtor who seeks to set aside a bankruptcy notice on the ground that it requires him to pay a judgment debt otherwise than in accordance with the terms of the judgment, must make an application in that behalf in accordance with r. 18 of the Rules.

5. A debtor who seeks to challenge the validity of a bankruptcy notice is also entitled to proceed under r. 95 of the Rules. However, if he does so, he must show that he has a counter-claim, set-off or cross-demand which equals or exceeds the amount of the judgment debt which he could not set up in the action in which the judgment was obtained. Further, he must act within the time limit prescribed by s. 3(1)(i) of the Act.

6. A debtor who seeks to challenge a bankruptcy notice on the ground that the amount specified therein exceeds the amount actually due, must act in accordance with proviso (ii) to s. 3(2) of the Act. Hence, he must, within the time prescribed

A in the bankruptcy notice give notice in writing to the creditor that he disputes the validity of the notice on the ground that it mistakenly claims an amount larger than that lawfully due.

7. A debtor who opposes a creditor's petition must comply with the procedure prescribed by r. 117 of the Rules. If he does not do so, any challenge he may mount is liable to fail for non-compliance of the Rules.

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[8] The following passage from the judgment of Mohamed Azmi SCJ in *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 provides the authority that a bankruptcy notice must be in accordance with the judgment:

C

> It is also essential that at the time of issue of the bankruptcy notice, the judgment creditor must be in the position to issue execution - see *Re Woodall, ex parte Woodall* [1884] 13 QBD 479. If part of the debt has been paid or unenforceable in bankruptcy, the notice can only be issued for the balance - see *Re a Debtor* (No 21 of 1937) [1938] 2 All ER 824. Thus, a bankruptcy notice can only be issued for the judgment debt or that part of the debt on which the creditor can issue execution. In the present case, as at the date of issue of the bankruptcy notice, only in respect of that part of the judgment debt of $2,325,000 the creditor could have issued execution. The remaining parts of the judgment debt on the interest on the loan and the costs of proceedings had not been quantified in accordance with the terms of the judgment, and hence these parts of the judgment debt were then incapable of being the subject of execution. In our view, the demand for payment of interest and costs was wrongly included in the bankruptcy notice because it was only after the issue of the notice ie, when the creditor's petition was issued on 6 January 1986 that the creditor was able to ascertain the base lending rate of '10.25%' per annum, and also to quantify the costs at $9,880.50 after taxation. Clearly, the bankruptcy notice was bad in law as it contained demand for payment of the whole judgment debt within seven days when parts of the whole debt had not been or could not be quantified, and as such were incapable of being made the subject of execution, and consequently incapable of being complied with. Non-compliance with the demand to pay such unascertained sums cannot constitute an act of bankruptcy.
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> The demand for payment in the notice must not only be quantified but must also be the correct sum owing as at the date

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of the notice.

[9] Now to revert to the facts in the instant appeal. The judgment, it is clear provides:

- in respect of the loan facility, the sum of RM200,443.87 the judgment provides for 1.75 % + BLR (at the moment 6.00% per annum) until date of full settlement and with penalty interest of 1% per annum on the prevailing rate of interest;

- in respect of the overdraft facility the loan sum of RM90,886.61 + interest of 2% above BLR (at the moment 6.00%) to be calculated at monthly rest from 1 June 2006 until full settlement + penalty at 1% per annum on interest to be paid at prevailing rate on all the overdue installment.

[10] But the bankruptcy notice applied for in respect of the term loan of RM200,443.87, the judgment creditor charged interest at 1.75% + BLR of 6.75% at monthly rest and penalty of 1% also at monthly rest. In respect of overdraft of RM90,886.61, the interest charged is 2% + BLR of 6.75% at daily rest and penalty of 1% at daily rest.

[11] It is clear therefore the bankruptcy notice was not in accordance with the judgment obtained. On this ground the appeal must be allowed with costs. The AO and RO must be set aside.